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FEDERAL ELECTION COMMISSION
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FIRST GENERAL COUNSEL'S REPORT

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RESPONDENTS:

Westar Energy, Inc.
David Wittig
Douglas Lake
Douglass Lawrence
Carl Koupal
Governmental Strategies, Inc.
Richard Bornemann

RELEVANT STATUTES:

2 U.S.C. § 441b
2 U.S.C. § 441(b)(a)
11 C.F.R. § 110.6
11 C.F.R. § 114.2(d)
11 C.F.R. § 114.2(f)
11 C.F.R. § 114.3(c)(2)(iii)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

This matter originated with a sua sponte submission filed by Westar Energy, Inc. ("Westar"), an electric utility based in Topeka, Kansas, regarding the activities of several former officers and an outside lobbyist. The activities involved top Westar executives soliciting earmarked contributions from other executives, collecting the contribution checks, and sending them to targeted federal candidates who were in a position to assist Westar in obtaining a highly lucrative exemption from certain federal regulatory requirements. Most of the activities described in the sua sponte submission occurred during the 2002 election cycle and involved thirteen Westar executives who contributed \$32,700 in response to solicitations; however, there is information indicating that similar activities occurred before 2002.

Westar does not acknowledge that its bundling of earmarked contributions constituted prohibited corporate facilitation and conduit activity in violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), and the Commission's implementing regulations.¹ Instead, Westar maintains that if the activities described in the submission violated the Act, the violations were de minimus and resulted from one of its officers and its outside lobbyist acting in a volunteer capacity and not in a corporate enterprise; therefore, the Commission should take no action. Westar also emphasizes the "aggressive actions" it has taken to ensure future compliance with the Act.

¹ The facts relevant to this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). All citations to FECA, codified at 2 U.S.C. §§ 431 *et seq.*, the Commission's regulations, and all statements of applicable law herein, refer to FECA and its implementing regulations as they existed prior to the effective date of BCRA.

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As more fully set forth below, it appears that Westar, certain of its officers, and its outside lobbyist engaged in activities that constitute corporate facilitation and prohibited conduit activity in violation of 2 U.S.C. § 441b(a) and 11 C.F. R. §§ 110.6(b)(2)(ii) and 114.2(f).

II. FACTUAL SUMMARY

A. Background

Westar Energy, Inc., formerly known as Western Resources, Inc., is a Kansas public corporation headquartered in Topeka.² It is the largest electricity provider in Kansas, serving more than 600,000 customers and employing more than 2,000 people. Between 1998 and 2002, the time period most relevant herein, Westar's President and Chief Executive Officer was David Wittig and its Vice President for Corporate Strategy was Douglas Lake.

According to information contained in the sua sponte submission, Westar has been politically active since the late 1980s, mostly as an advocate for public utility deregulation. The company's political activities have included direct corporate contributions to state and local candidates (permitted under state law), contributions from Westar's separate segregated fund, most recently known as the Western Resources Political Action Committee ("Westar PAC"), to federal candidates, and earmarked contributions from Westar executives to federal candidates, primarily within the Kansas congressional delegation. Notably, after Wittig became President and CEO in 1998, employee contributions to the Westar PAC declined significantly and individual earmarked contributions from Westar executives increased in their place.³

² Two utility companies dating to the early 1900s merged to form Western Resources in 1992. In 2002, Western Resources, Inc., changed its name to "Westar Energy," which is referred to throughout this Report as "Westar."

³ Westar cites in part David Wittig's "contentious leadership style" for the drop in contributions to the Westar PAC. On March 29, 2001, the PAC notified the Commission that it was terminating effective December 31, 2000. As part of its recent corporate reform efforts, Westar has resurrected a PAC, the Westar Energy Employees Political Action Committee, which filed its Statement of Organization with the Commission on October 3, 2003.

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B. 2002 Contribution Activity

As recounted in Westar's voluntary submission to the Commission, in late 2001, Congress began to consider a major energy deregulation bill that had significant consequences for Westar. See Sua Sponte Submission ("Submission"), at 9. The press reported that an early version of the Energy Bill, proposed by Rep. Joe Barton, would have exempted any subsidiary or affiliate of a utility holding company from Securities and Exchange Commission oversight under the Investment Company Act of 1940 ("ICA").⁴ Along with a widely accepted effort to repeal the Public Utility Holding Company Act of 1935, the ICA exemption provision would have allowed utility companies to create and own investment companies that would not be subject to any federal regulatory oversight.⁵ Westar acknowledged in its Submission that it was extremely interested in getting this legislation enacted.⁶

Because of strong opposition from several congressional members and the SEC, neither the Senate nor House versions of the Bill contained the industry-wide exemption.⁷ Consequently, according to the Submission, Westar and its outside lobbyist, Richard Bornemann of Virginia-based Governmental Strategies, Inc., devised a political strategy to try to preserve the exemption in

⁴ See Michael Schroeder, *House Power Bill Allows for Host of Exemptions*, Wall. St. J., Feb. 15, 2002, at A4.

⁵ *Id*

⁶ In the early 1990s, at a time of public utility deregulation, Westar began to diversify the company business by increasing its electric utility holdings as well as acquiring non-regulated businesses unrelated to traditional energy services. Submission, at 2-3. Wittig and Lake reportedly wanted the ICA exemption so that they could leave management of Westar, a regulated utility, and take over what would have been Westar's unregulated affiliates. See Special Report (discussed *infra*), at 147-157.

⁷ See, e.g., *Testimony Concerning H.R. 3406 and Repeal of the Public Utility Holding Company Act of 1935 and Testimony Concerning The Enron Bankruptcy, the Functioning of Energy Markets and Repeal of the Public Utility Holding Company Act of 1935 Hearings Before the House Comm on Energy and Commerce, Subcomm on Energy and Air Quality* (Dec. 13, 2001, and Feb. 13, 2002) (statements of Isaac C. Hunt, Jr., Commissioner, U S. Securities and Exchange Commission).

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1 the legislation. Submission, at 9. This strategy included the making of contributions to the
2 political committees of key legislators behind the Bill. *See id.*, Attachment 11 (Bornemann
3 memo).

4 Toward this end, on April 23, 2002, Bornemann submitted a memorandum to Douglass
5 Lawrence, Westar's then-Vice President of Government Affairs, outlining a plan to have Westar
6 make contributions to Rep. W.J. "Billy" Tauzin, Rep. Joe Barton, Rep. Michael G. Oxley, Rep.
7 Richard Burr, Sen. Richard C. Shelby, House Majority Leader Tom DeLay, and to these
8 legislators' designees. *See id.* The memo recommended that Westar executives or Westar PAC
9 give \$31,500 to these specific candidates and that Westar make a \$25,000 contribution in
10 nonfederal funds to Rep. DeLay's Texans for a Republican Majority PAC. *Id.* The stated purpose
11 of the proposed contributions was "to develop a significant and positive profile for the Company's
12 federal presence." *Id.*

13 The Submission notes that shortly thereafter, Lawrence and Wittig devised a payment
14 schedule for thirteen Westar executives at the Vice President level or above to make individual
15 contributions to the targeted legislators.⁸ *See* Submission, at 9-10, and Attachment 12. Based on
16 their salaries, Lawrence asked executives to give specific amounts to specific candidates. *Id.*
17 Lawrence made these solicitations by internal office memoranda and email. *Id.* In one such inter-
18 office memorandum dated May 17, 2002, and entitled "Suggested Campaign Contributions,"
19 Lawrence tied the solicitation to the pending Energy Bill and its impact on Westar's financial
20 restructuring plan. *See* Submission, Attachment 12. The memorandum had three attachments: the

⁸ Although it appears that Douglas Lake, Westar's second-in-command, did not actively participate in the creation of the payment schedule, he made contributions in furtherance of the contribution plan and forwarded his contributions to Lawrence. *See* Submission, Attachment 17.

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In response to these solicitations, each executive made the requested contributions, though some gave more or less than the requested amount. *See id.*; *see also* Submission, Attachment 15. Chart 1 below sets forth the total amounts requested from and contributed by the executives who participated in the plan. Chart 2 below sets forth the committees that received contributions pursuant to the contribution plan.

NAME	TITLE	TOTAL AMOUNT REQUESTED	TOTAL AMOUNT CONTRIBUTED
David Wittig	President and CEO	\$9,450	\$10,000
Doug Lake	Executive VP Corporate Strategy	\$6,300	\$ 6,300
Doug Sterbenz	Sr. VP Generation & Marketing	\$3,150	\$ 4,200
Paul Geist	Sr. VP and CFO	\$2,677.50	\$ 425
Richard Dixon	Sr. VP Customer Operations	\$1,890	\$ 950
Anita "Jo" Hunt	VP Risk Management	\$1,417.50	\$ 1,700
Douglass Lawrence	VP Government Affairs	\$ 945	\$ 3,300
Leroy Wages	VP, Controller & International Generation	\$ 945	\$ 800
Bruce Akin	VP Business Services	\$ 945	\$ 800
Larry Irick	VP, General Counsel & Corporate Secretary	\$ 945	\$ 850
Peggy Loyd	VP Financial Services	\$ 945	\$ 850
Caroline Williams	VP Customer Care	\$ 945	\$ 1,600
Kelly Harrison	VP Regulatory	\$ 945	\$ 925
Total:		\$31,500	\$32,700

CHART 2
Recipients of Westar Contributions
May 31, 2002 – Dec. 19, 2002

COMMITTEE	TOTAL
The Congressman Joe Barton Committee	\$2,000
Bayou Leader PAC (Tauzin)	\$2,800
Shelley Moore Capito for Congress	\$1,000
Tom DeLay Congressional Committee	\$2,400 ⁹
Graves for Congress	\$1,000
Hayes for Congress	\$1,500
Latham for Congress	\$1,000
Leadership PAC 2004 (Oxley)	\$1,000
Next Century Fund (Burr)	\$1,000
Northup for Congress	\$ 850
NRCCC	\$1,150
Oxley for Congress	\$1,000
Volunteers for Shimkus	\$1,000
Simmons for Congress	\$1,000
Team Sununu	\$2,000
Texas Freedom Fund (Barton)	\$2,000
Tom Young For Congress	<u>\$10,000</u>
Total:	\$32,700

According to the Submission, after the executives submitted the contribution checks, Lawrence collected the contributions and sent them as a bundle to the recipient committees.¹⁰ In at least some cases, Lawrence forwarded the contribution checks to Bornemann to be hand-delivered to the candidates at fundraising events.¹¹ See Submission, at 10. Contributions were delivered to the targeted legislators at varying times through late 2002.

⁹ In addition, in May 2002, Westar gave a \$25,000 contribution to Rep. DeLay's Texans for a Republican Majority.

¹⁰ As of May 2, 2004, Westar reported finding Federal Express receipts documenting 5 shipments of Westar employees' checks to candidate committees. See Submission, at 12; Supplemental Submission, May 2, 2004.

¹¹ Westar's submission and a Special Report prepared for Westar during an internal investigation, discussed *infra*, p. 8, conflict on this point. The Special Report states that Westar sometimes sent checks directly to the recipient committees, while the submission and accompanying affidavits from Lawrence and his assistant state that the checks always were sent to Bornemann.

C. The Special Report

In September 2002, the U.S. Attorney's Office in Topeka served subpoenas on Westar seeking information about Wittig and Westar's business practices. It was at this time that Westar first learned that Wittig had been the subject of a federal grand jury investigation since July 2002 regarding a personal bank loan transaction.¹² In response, Westar hired the law firm of Debevoise & Plimpton ("Special Committee") to investigate independently the matters set forth in the corporate subpoenas.¹³ Shortly thereafter, Westar placed Wittig and Lake on administrative leave based on the Special Committee's preliminary findings that they had engaged in fraudulent practices while running Westar. Wittig resigned on Nov. 22, 2002, and Lake was fired in June 2003. Submission, at 6.

On April 29, 2003, the Special Committee presented the Westar Board of Directors with the results of its investigation in an almost 400-page report ("Special Report").¹⁴ The Special Report primarily describes a multitude of fraudulent corporate practices by Wittig and Lake, including extensively using company airplanes for personal use, investing corporate assets in companies in which they had undisclosed financial interests, and misleading the company's Human Resources Board so that they would receive greater compensation. In December 2003,

¹² The investigation apparently was not connected to his Westar duties. In November 2002, Wittig was indicted, and in July 2003, he was found guilty on six counts relating to the personal loan, including conspiracy and money laundering. On February 27, 2004, Wittig received a prison sentence of four years and 3 months and a \$1 million fine. It appears that the investigation of Wittig's personal bank loan transaction led to the discovery of Wittig and Lake's alleged fraudulent activities at Westar, resulting in the September 2002 subpoenas served on Westar and later another indictment charging Wittig and Lake with 40 counts of various corporate abuses.

¹³ Westar continued to receive subpoenas from the U.S. Attorney's Office while Debevoise & Plimpton was conducting its investigation. It also received a subpoena from the Securities and Exchange Commission concerning its 2002 financial statements and a subpoena from the Federal Energy Regulatory Commission regarding power transfers and marketing operations.

¹⁴ See http://media.corporate-ir.net/media_files/nys/wr/reports/custom_page/WestarEnergy.pdf.

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1 based upon the U.S. Attorney's investigation into the same corporate abuses, Wittig and Lake were
2 indicted on 40 counts, including conspiracy to defraud Westar, circumventing internal accounting
3 controls, falsifying books and records, wire fraud, and submitting false statements.¹⁵ Wittig and
4 Lake's trial is scheduled to start on October 12, 2004.

5 During the internal investigation into Westar's corporate practices, the Special Committee
6 discovered potential election law violations made by Westar under Wittig's tenure. The Special
7 Committee devoted a relatively short section (eight pages) of the Special Report to these potential
8 violations. See Submission, Attachment 3. The Special Report describes organized efforts by
9 Wittig, Lake, Lawrence and Lawrence's predecessor, Carl Koupal, between 2000 and 2002 to
10 make contributions to state and federal candidates who were in positions to benefit Westar. *Id.*, at
11 341-344. Notably, the Special Report provides greater detail about Westar's pre-2002 contribution
12 activity (when Carl Koupal led the governmental affairs office) than does Westar's sua sponte
13 submission.

14 According to the Special Report, "management had a practice of soliciting individual
15 officers for recommended political contributions earmarked for particular candidates." See *id.*, at
16 342. The Special Committee interviewed many of the executives who were asked to make
17 contributions and reviewed relevant documents, including email communications. According to
18 the Special Committee, "some officers felt pressured to contribute, and were of the view that Mr.
19 Wittig had let it be known that he wanted officers to contribute when Mr. Koupal came to ask." *Id.*
20 at 344. On the other hand, the Special Report noted that "employees indicated in interviews that
21 they could refuse to make contributions to a particular candidate" and "none of the officers we

¹⁵ See Indictment, *United States v Wittig and Lake*, 5:03-cr-40142-JAR (D. Kan. Dec. 3, 2003). The 40-count indictment does not charge Wittig or Lake with any crimes relating to campaign finance law violations.

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1 spoke to reported having been told that his or her job would be in jeopardy or that there would be
2 any other form of retribution if he or she did not contribute.” *Id.* In conclusion, the Special
3 Committee recommended that Westar hire election counsel to further analyze the events. *Id.*, at
4 348-349.

5 In May 2003, Westar posted the Special Report and the accompanying 246 exhibits on
6 Westar’s website. Soon thereafter, news stories and editorials began appearing in the media about
7 the Special Report’s revelations; most of the articles focused on the 2002 political contribution
8 activity that seemed directly tied to the Congressional assistance Westar reportedly received during
9 negotiations on the Energy Bill.¹⁶ Consequently, many of the legislators who received Westar
10 contributions faced allegations by public interest groups and other legislators that they were bribed
11 for their votes and should be investigated for ethics violations.¹⁷ Public attention also fell upon
12 Westar’s lobbyist, Richard Bornemann, for devising the contribution plan.¹⁸ Some legislators
13 disgorged their Westar contributions by donating an equivalent dollar amount to charity.¹⁹

¹⁶ See, e.g., Thomas B. Edsall and Juliet Eilperin, *Democrats, Group Seek Probe of GOP, Westar*, The Wash. Post, June 7, 2003, at A2; Thomas B. Edsall and Juliet Eilperin, *Agency Questions Westar Provision; Executives Called Real Beneficiaries*, The Wash. Post, June 14, 2003, at A4; *Westar Drops Former V.P.-Turned-Lobbyist, Finds Itself in Growing Public Political Scandal*, Electric Utility Week, June 16, 2003, at 1.

¹⁷ See, e.g., Charles Babington and Dan Morgan, *Ethics Truce Frays in House*, The Wash. Post, March 17, 2004, at A1; Thomas B. Edsall, *Westar a Saga of Money’s Role on Hill; Some Demand Probe as GOP Lawmakers Say No Legislative Deals Were Made*, The Wash. Post, June 23, 2003, at A5. For example, Public Citizen filed a complaint with the Department of Justice’s Office of Public Integrity and posted the complaint on its website. In a June 2003 document posted on its website, Public Citizen said that if “requests” the FEC to investigate Westar and the legislators’ potential breaches of campaign finance laws. Public Citizen never filed a complaint with the Commission.

¹⁸ See, e.g., Juliet Eilperin, *Westar Lobbyist’s Role Detailed, Firm’s Representative Attended 2 GOP Lawmakers’ Fundraisers*, The Wash. Post, June 10, 2003, at A4; Pete Yost, *Who Solicited Westar Donations – Tauzin and Barton or Utility’s Lobbyist?*, Associated Press, June 10, 2003; Pete Yost, *Tauzin, Barton Raised Money for 7 Republicans Who Later Got Donations from Westar*, Associated Press, June 10, 2003.

¹⁹ See, e.g., Thomas B. Edsall, *Westar a Saga of Money’s Role on Hill; Some Demand Probe as GOP Lawmakers Say No Legislative Deals Were Made*, The Wash. Post, June 23, 2003, at A5. Research of FEC disclosure report databases

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D. Prior Contribution Activities

As disclosed in the Special Report, it appears that the 2002 contribution plan was not an isolated incident and that Westar had a history of coordinated contribution efforts. *See* Submission, Attachment 3, at 341. The Special Report described one incident in September 2000 where Wittig and Koupal solicited six executives and requested \$15,500 in political contributions through a payment schedule similar to the one created for the 2002 activity. *Id.*, at 342. An email communication from Koupal to Lake dated Sept. 20, 2000, outlined a plan to request contribution checks and "deliver them together," indicating an intent that the contributions be sent as a package to the various candidates. *See* Submission, Attachment 10. According to disclosure reports, it appears that this solicitation resulted in \$13,500 in contributions to four federal candidates. Chart 3 below sets forth the September 2000 contribution effort, and Chart 4 identifies the targeted legislators and the contributions they received.

revealed no refunds to Westar executives. Research also revealed that Rep. Burr's Next Century Fund and Team Sununu appear to have disgorged \$1,000 Westar contributions to charitable organizations, and Rep. Dennis Moore appears to have disgorged \$1,800 out of \$2,750 he received from Westar.

CHART 3
Westar Executives' Contribution Schedule for Federal Candidates
September 2000 Plan

NAME	TITLE	TOTAL AMOUNT REQUESTED	TOTAL AMOUNT CONTRIBUTED
David Wittig	President and CEO	\$5,500	\$5,500
Doug Lake	Executive VP Corp. Strat.	\$3,000	\$3,000
Thomas Grennan	Executive VP	\$2,000	\$2,000
Carl Koupal	Chief Administrative Officer	\$1,750	\$0
Richard Terrill	General Counsel	\$1,750	\$1,750
Rita Sharpe	Executive VP	\$1,500	\$1,250
Total:		\$15,500	\$13,500

CHART 4
Recipients of Westar Contributions
September 2000 Plan

COMMITTEE	PROPOSED CONTRIBUTION	TOTAL RECEIVED
Dennis Moore for Congress	\$3,500	\$2,750
Moran for Congress	\$1,750	\$1,500
Jim Ryun for Congress	\$5,250	\$6,750
Tiahrt for Congress	\$5,000	\$2,500
Total:	\$15,500	\$13,500

Based on interviews with Westar executives, the Special Report states that Wittig took responsibility for devising this payment schedule and choosing the candidates, in consultation with others, including Koupal. Submission, Attachment 3, at 342. Until he left Westar in late 2001, Koupal, like his successor Lawrence, had primary responsibility for soliciting the executives, collecting contribution checks, and sending the checks to recipient committees.²⁰ *Id.*, at 343.

²⁰ Although there is no information indicating that he actively participated in devising the payment schedule or collecting and forwarding the contributions, as in 2002, Lake was aware of the planned contribution activity and made contributions in furtherance of the September 2000 plan. *See, supra*, n. 8.

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1 Other than the September 2000 solicitation, neither the Special Report nor the sua sponte
2 submission cites to specific organized efforts to bundle and forward contribution checks in a
3 manner similar to the 2002 solicitations. FEC disclosure reports disclose a few instances of
4 apparent bundled contributions from Westar executives between June 2001 and February 2002,
5 where two or more Westar executives made contributions at or around the same time to the same
6 committee.²¹

7 **III. LEGAL ANALYSIS**

8 **A. Westar, Wittig, Lake, Lawrence and Koupal**

9 Westar acknowledges that David Wittig devised the payment schedules for the earmarked
10 contributions made by executives between at least 2000 and 2002 and does not deny the finding
11 contained in the Special Report that Wittig, along with Koupal and Lawrence, helped select the
12 candidates to whom contributions should be made. Westar also does not deny that Lake
13 participated in the contribution plans generally by being aware of them and specifically by making
14 the solicited contributions. Finally, Westar acknowledges that Lawrence and Koupal acted as
15 conduits or intermediaries by collecting earmarked contribution checks from Westar executives
16 and forwarding them as a package to various recipient committees or to Bornemann who then
17 delivered the checks to the recipient committees.

18 Despite the undisputed facts, Westar claims that Lawrence and Koupal were acting in a
19 volunteer capacity and not as part of a corporate enterprise, and, thus, their activities were

²¹ Based on disclosure reports, the following additional seemingly bundled contributions occurred: June 15, 2001, \$1,250 from 5 Westar executives to Pat Roberts for Senate; Jan. 9, 2002, \$1,000 from 2 executives to Moran for Kansas; Jan. 10, 2002, \$1,200 from 2 executives to Jim Ryun for Congress; Feb. 5, 2002, \$1,200 from 2 executives to Tiahrt for Congress; and Feb. 23, 2002, \$1,200 from 2 executives to Sam Brownback for U.S. Senate.

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1 permissible or at the most de minimus violations.²² This claim does not appear to be supported by
2 the facts. A corporation can only act through its directors, officers, and agents. *United States v.*
3 *Wallach*, 935 F.2d 445, 462 (2d Cir. 1991); 1 William Meade Fletcher et al., *Fletcher Cyclopedica*
4 *of the Law of Private Corporations* § 30 (1999 and Supp. 2003). Moreover, corporations may be
5 held liable, both civilly and criminally, for the acts of an employee within the scope of the
6 employment and that benefit the corporate employer. *See, e.g., Liquid Air Corp. v. Rogers*, 834
7 F.2d 1297, 1306 (7th Cir.1987); 18B Am. Jur. 2d *Corporations* §§ 2131, 2136 (2003). The
8 information available indicates that Lawrence and Koupal solicited, collected and bundled the
9 earmarked contributions from Westar executives using corporate resources and at the request and
10 direction of Westar and, more specifically, Wittig, the company's President and CEO. There is no
11 indication that Lawrence or Koupal devised the contribution plans on their own or that, absent their
12 employment, they would have solicited contributions from Westar executives. Further, there is
13 information that the executives solicited by Lawrence and Koupal felt that the solicitations were
14 ultimately coming from Wittig. Thus, it appears that Lawrence and Koupal acted in their corporate
15 capacities for the benefit of Westar.

16 Corporations are prohibited from acting as conduits for contributions earmarked to
17 candidates or their authorized committees. *See* 11 C.F.R. § 110.6(b)(2)(ii). In addition, the
18 prohibition against corporate contributions embodied in 2 U.S.C. § 441b(a) includes the facilitation
19 of earmarked contributions by a corporation and its officers, directors, or agents. *See* 11 C.F.R. §
20 114.2(f)(1). Examples of facilitation include directing subordinates to plan, organize, or carry out

²² Under Commission regulations, corporate employees may make occasional, isolated or incidental use of corporate facilities for their own individual volunteer activities in connection with a federal election provided the corporation is reimbursed for certain costs incurred by such activity. 11 C.F.R. § 114.9(a).

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1 a fundraising project as part of their work responsibilities, using corporate resources and providing
2 materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes or
3 other similar items, or using coercion to urge individuals to make contributions. 11 C.F.R. §§
4 114.2(f)(2)(ii) and 114.2(f)(2)(iv). By collecting and forwarding earmarked contributions to
5 candidates, Westar appears to have violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2)(ii)
6 and 114.2(f) by acting as a conduit and facilitating the making of contributions.²³

7 Accordingly, this Office recommends that the Commission find reason to believe that
8 Westar Energy, Inc., acting through its officers and agents, violated 2 U.S.C. § 441b(a) and 11
9 C.F.R. § 114.2(f) by facilitating the making of contributions and violated 11 C.F.R. §
10 110.6(b)(2)(ii) by acting as a conduit for earmarked contributions to candidates. This Office also
11 recommends that the Commission find reason to believe Wittig, Lake, Lawrence and Koupal
12 violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2)(ii) and 114.2(f) by participating in and/or
13 consenting to the corporate facilitation and improper conduit activity committed by Westar.²⁴

14
15 _____
²³ Based on interviews with Westar executives, the Special Report notes, "at least one employee complained ... that employees felt coerced and intimidated into making requested contributions by Mr. Wittig." See Submission, Attachment 3 at 347. However, the Special Report states and Westar maintains that there is no evidence of any overt coercion. In fact, some employees did not contribute as much as they were asked to, and no detrimental action appears to have resulted. Westar initially pointed out that Wittig and Lake never communicated with the employees regarding contributions, and that they never bothered to find out who contributed in what amount; however, information provided by Westar's counsel and received on September 1, 2004 indicates that Wittig sent an internal memorandum to company executives dated May 3, 2002, in which he set forth a "guideline" for how each executive "might" share the responsibility for making contributions. In any case, Westar also argues that Lawrence, who had the most contact with the solicited executives, was a peer and not a superior. In fact, no employee Lawrence supervised in the Government Affairs office was asked to contribute. Regardless of whether Westar used coercion to urge employees to make contributions, it appears that Westar committed corporate facilitation by collecting and forwarding the checks to committees.

²⁴ There is no publicly available information indicating that Westar reimbursed the executives for their contributions, and, to the contrary, Lawrence attests in an affidavit that he never received reimbursement from Westar. See Submission, Attachment 1. Accordingly, and based on other available information at this time, this Office does not believe that the facts support a "knowing and willful" finding or a Section 441f violation.

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B. GSI and Bornemann

Westar created an agency relationship with GSI and Bornemann when they contracted for lobbying and governmental affairs consulting services. *See* Restatement (Second) Agency § 15 (agency relationship exists if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent to so act). As Westar's agents, GSI and Bornemann were prohibited from engaging in corporate facilitation of individual earmarked contributions on behalf of Westar. *See* 11 C.F.R. § 114.2(f)(1) (the prohibition against corporate facilitation extends to agents of a corporation). Nevertheless, in addition to devising the plan for the 2002 contributions, Bornemann received the individual contributions directly from Westar and delivered them to the recipient committees.

There is information indicating that Bornemann also knew the contributions had been collected and bundled by Westar. Indeed, according to affidavits attached to the Submission, Douglass Lawrence's administrative assistant mailed the bundled contributions in Federal Express envelopes directly from Westar to Bornemann. Lawrence Aff. ¶ 8 and Lewis Aff. ¶ 4. As recipients of mailings from the corporation, rather than from the individual donors, it appears that Bornemann knew that Westar facilitated the transmittal or delivery of the contributions. By delivering the contributions to the recipient committees, with the knowledge that the contributions had been collected, bundled and forwarded by the corporation, Bornemann and his firm played a substantial role in the prohibited corporate facilitation as the agents of Westar.

Therefore, this Office recommends that the Commission find reason to believe that Government Strategies, Inc., and Richard Bornemann violated 11 C.F.R. § 114.2(f)(1) by facilitating bundled contributions to political committees on behalf of Westar.

C. Recipient Committees

Section 441b(a) also makes it unlawful for any candidate, political committee, or other person to knowingly accept or receive a corporate contribution.²⁵ The circumstances surrounding the 2002 facilitation and conduit activity described above, particularly information that certain candidates may have personally received the bundled contributions at fundraising events, suggest that many recipient committees may have knowingly received prohibited contributions. In addition, the facts surrounding the contributions resulting from the September 2000 solicitation suggest that the committees may have known they were receiving prohibited contributions, primarily because Koupal collected, bundled and forwarded the earmarked contributions to the targeted political committees.²⁶ Additional information would be needed, however, to determine which candidates or committees had the requisite knowledge, if any. Given the relatively small amount potentially in violation (\$52,050 divided among 23 committees), a formal investigation may not be an appropriate use of the Commission's limited resources. Accordingly, this Office recommends that the Commission take no action at this time against the recipient committees but send a letter notifying them of the prohibited contributions and requiring disgorgement (if they have not already done so).²⁷

²⁵ The committee treasurer must use best efforts to determine the legality of a questionable contribution. 11 C.F.R. § 103.3(b)(1).

²⁶ Five other instances of apparent bundled contributions also suggest that the committees may have known they were receiving prohibited contributions. See n. 24, *supra*.

²⁷ The recipient committees that have not disgorged their Westar contributions consist of The Congressman Joe Barton Committee (Judy Markley, treasurer); Bayou Leader PAC (Tauzin) (Emily Young Shaw, treasurer); Sam Brownback for U.S. Senate (Steven Poage, treasurer); Shelley Moore Capito for Congress (Reed Spangler, treasurer); Tom DeLay Congressional Committee (Dana Benoit, treasurer); Graves for Congress (Terry J. Brady, treasurer); Hayes for Congress (John Haynes, treasurer); Latham for Congress (Robert W. Brinton, treasurer); Leadership PAC 2004 (Oxley) (Pamela Sederholm, treasurer); Dennis Moore for Congress (Constance Shidler, treasurer); Moran for Kansas (Thomas V. Dechant, treasurer); Northup for Congress (James Meagher, treasurer); NRCCC (Christopher J. Ward, treasurer); Oxley for Congress (Jody Beall O'Brien, treasurer); Pat Roberts for Senate (Robert A. Parrish, treasurer);

IV. CONCILIATION AND CIVIL PENALTY

Jim Ryun for Congress (Stephen R. Iliff, treasurer); Volunteers for Shimkus (Erik J. Dillman, treasurer); Simmons for Congress (Anne Simeone, treasurer); Texas Freedom Fund (Barton) (Jeff MacKinnon, treasurer); Tiahrt for Congress (George C. Bruce, treasurer); Tom Young For Congress (Mark E. Hieronymus, treasurer).

PAGES 19-20 HAVE BEEN REMOVED

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V. RECOMMENDATIONS

1. Find reason to believe that Westar Energy, Inc., David Wittig, Douglas Lake, Douglass Lawrence and Carl Koupal violated 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 110.6(b)(2)(ii) and 114.2(f);
2. Find reason to believe that Governmental Strategies, Inc., and Richard Bornemann violated 11 C.F.R. § 114.2(f);
- 3.
- 4.
- 5.
6. Approve the attached Factual and Legal Analyses; and
7. Approve the appropriate letters, including letters to recipient committees requiring disgorgement.

Lawrence H. Norton
General Counsel

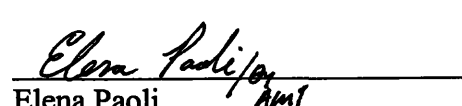
Date:

9/24/04

BY:


Rhonda J. Vosdigh
Associate General Counsel


Ann Marie Terzaken
Assistant General Counsel


Elena Paoli
Attorney

Attachments:

- 1.
2. Proposed Factual and Legal Analysis for Westar Energy, Inc.
- 3.
4. Proposed Factual and Legal Analysis for David Wittig
- 5.
6. Proposed Factual and Legal Analysis for Douglas Lake
- 7.
8. Proposed Factual and Legal Analysis for Douglass Lawrence
- 9.
10. Proposed Factual and Legal Analysis for Carl Koupal
- 11.
12. Proposed Factual and Legal Analysis for Governmental Strategies, Inc., and Richard Bornemann

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